Supreme Court, U.S.
FILED
FEB 26 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-742 (A)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JAMES A. COLLINS, Director,
Texas Department of Corrections,
Petitioner,

v.

CARROLL F. YOUNGBLOOD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF WILBERT LEE EVANS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

ARTHUR F. MATHEWS *
THOMAS F. CONNELL
MARK D. CAHN
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000
Counsel for Amicus Curiae

* Counsel of Record

February 26, 1990

BEST AVAILABLE COPY

37

QUESTIONS PRESENTED

1. Whether it violates the *ex post facto* clause of the United States Constitution retroactively to apply a penal statute which validates a verdict that was void and unenforceable under the law in place when the offense was committed and the verdict was rendered.

2. Whether it violates the *ex post facto* clause of the United States Constitution retroactively to apply a penal statute which deprives a defendant of an absolute defense to imposition of punishment available under the law in place when the offense was committed and the verdict was rendered.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF AMICUS CURIAE WILBERT LEE EVANS	1
STATEMENT	3
SUMMARY OF ARGUMENT	8
ARGUMENT	10
I. RETROACTIVE APPLICATION OF THE TEXAS STATUTE AT ISSUE HERE VIOLATED THE *EX POST FACTO* CLAUSE BECAUSE IT DEPRIVED THE DEFENDANT OF THE "SUBSTANTIAL RIGHT," MANDATED BY THE LAW IN PLACE AT THE TIME OF TRIAL, TO BE FREE FROM THE VERDICT OF GUILT AND PUNISHMENT RENDERED AGAINST HIM	10
A. From the Beginning of the Republic, This Court Has Construed the *Ex Post Facto* Clause to Prohibit a Wide Array of Retrospective Legislation Which Has a Substantial Adverse Impact on the Defendant	11
B. This Court and the Lower Courts Have Repeatedly Held That New Laws of Criminal Procedure Cannot Be Applied Retroactively If They Cause Substantial, Demonstrable Prejudice to the Defendant	15
C. The Revised Texas Statute Caused Substantial Demonstrable Prejudice to Youngblood, Because It Retroactively Deprived Him of His Right to Liberty and the Presumption of Innocence	21

TABLE OF CONTENTS—Continued

	Page
II. EVEN IF THE STANDARD URGED BY PETITIONER AND THE UNITED STATES WERE ADOPTED, THE DECISION BELOW WOULD STILL BE CORRECT	27
CONCLUSION	30

TABLE OF AUTHORITIES

CASES	Page
Beazell v. Ohio, 269 U.S. 163 (1925)	13, 19
Bogany v. State, 661 S.W.2d 957 (Tex. Crim. App. 1983) (en banc)	6, 7
Buster v. State, 42 Tex. 315 (1875)	4, 5
Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798)	*passim*
Camp v. State, 200 S.E. 126 (Ga. 1939)	18
Clements v. United States, 266 F.2d 397 (9th Cir.), *cert. denied*, 359 U.S. 985 (1959)	18
Dobbert v. Florida, 432 U.S. 282 (1977)	*passim*
Duncan v. Missouri, 152 U.S. 377 (1894)	16
Ellison v. State, 432 S.W.2d 955 (Tex. Crim. App. 1968)	7
Evans v. Commonwealth, 228 Va. 468, 323 S.E.2d 114 (1984), *cert. denied*, 471 U.S. 1025 (1985)	3
Evans v. State, 35 Tex. Crim. 485 (1896)	4
Evans v. Thompson, 881 F.2d 117 (4th Cir.), *cert. pending*, No. 89-516 (filed Sept. 27, 1989)	2, 26
Ex parte Abahosh, 561 S.W.2d 202 (Tex. Crim. App. 1978)	17, 18
Ex parte Spaulding, 687 S.W.2d 741 (Tex. Crim. App. 1985) (en banc)	7, 8, 29
Falter v. United States, 23 F.2d 420 (2d Cir.), *cert. denied*, 277 U.S. 590 (1928)	18
Gut v. State, 76 U.S. 35 (1870)	16
Hopt v. Utah, 110 U.S. 574 (1884)	16, 20
Hurt v. State, 199 S.E. 801 (Ga. 1938)	18
In re Medley, 134 U.S. 160 (1890)	15
King v. State, 710 S.W.2d 110 (Tex. Crim. App. 1986), *cert. denied*, 484 U.S. 829 (1987)	5
Kring v. Missouri, 107 U.S. 221 (1883)	*passim*
Lindsey v. Washington, 301 U.S. 397 (1937)	16
Mafnas v. Government of Guam, 228 F.2d 283 (9th Cir. 1955)	18
Mallett v. North Carolina, 181 U.S. 589 (1901)	*passim*
Miller v. Florida, 482 U.S. 423 (1987)	*passim*
Moore v. State, 43 N.J.L. 203 (1881)	17, 29
Ocker v. State, 477 S.W.2d 288 (Tex. Crim. App. 1972)	7

TABLE OF AUTHORITIES—Continued

	Page
Patterson v. Commonwealth, 222 Va. 653, 283 S.E.2d 212 (1981)	2
Rubino v. Lynaugh, 845 F.2d 1266 (5th Cir. 1988)	17, 23
Shackelford v. State, 277 S.W.2d 695 (Tex. Crim. App. 1925)	5
Smith v. State, 479 S.W.2d 680 (Tex. Crim. App. 1972)	7, 8
Sobick v. Superior Court, 28 Cal. App. 3d 846, 106 Cal. Rptr. 516 (1972)	17
State v. Edwards, 701 P.2d 508 (Wash. 1985) (en banc)	18
State v. Keith, 63 N.C. 140 (1869)	28, 29
State v. Norton, 675 P.2d 577 (Utah 1983), *cert. denied*, 466 U.S. 942 (1984)	26
Thompson v. Missouri, 171 U.S. 380 (1898)	*passim*
Thompson v. Utah, 170 U.S. 343 (1898)	*passim*
Tyra v. State, 534 S.W.2d 695 (Tex. Crim. App. 1976), *ovrld. on other grounds, Cooper v. State*, 631 S.W.2d 508 (Tex. Crim. App. 1982)	5
United States ex rel. Massarella v. Elrod, 682 F.2d 688 (7th Cir. 1982), *cert. denied*, 460 U.S. 1037 (1983)	18
United States v. Fraidin, 63 F. Supp. 271 (D. Md. 1945)	18
United States v. Hall, 26 F. Cas. 84 (D. Pa. 1809) (No. 15,285), *aff'd*, 10 U.S. (6 Cranch) 171 (1810)	13
United States v. Kowal, 596 F. Supp. 375 (D. Conn. 1984)	18
Weaver v. Graham, 450 U.S. 24 (1981)	*passim*
Wilkes v. State, 237 S.W.2d 991 (Tex. Crim. App. 1951)	5
Wooldridge v. State, 13 Tex. Crim. 443 (1883)	4, 7
Youngblood v. Lynaugh, 882 F.2d 956 (5th Cir.), *cert. granted*, 110 S. Ct. 560 (1989)	21, 22

TABLE OF AUTHORITIES—Continued

STATUTORY PROVISIONS	Page
Acts 1985, 69 Leg., ch. 291, § 1, eff. Sept. 1, 1985	6
Tex. Code Crim. Proc. art. 693 (1925)	4
Tex. Code Crim. Proc. art. 626 (1856)	4
Tex. Code Crim. Proc. Ann. art. 37.07(2)(b)(2) (Vernon 1981)	6
Tex. Code Crim. Proc. Ann. art. 37.07(2)(b)(2) (Vernon Supp. 1990)	6
Tex. Code Crim. Proc. Ann. art. 37.07(3)(c) (Vernon 1981 & Supp. 1990)	6
Tex. Code Crim. Proc. Ann. art. 37.10(b) (Vernon Supp. 1990)	8
Tex. Code Crim. Proc. Ann. art. 44.24(b) (Vernon 1979)	6
Tex. Code Crim. Proc. Ann. art. 44.29(a) (Vernon Supp. 1990)	6
U.S. Const. Art. I, § 10, cl. 1	8, 11
Va. Code § 19.2-264.4(E) (1983)	2, 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-742

JAMES A. COLLINS, Director,
Texas Department of Corrections,
Petitioner,

v.

CARROLL F. YOUNGBLOOD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF WILBERT LEE EVANS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE WILBERT LEE EVANS*

This case presents the question of whether a state statute may retroactively deprive a criminal defendant of the right, guaranteed by the law in place at the time of his offense and trial, to an order vacating any finding of guilt and prohibiting the imposition of punishment upon proof of error in the jury's verdict. Wilbert Lee Evans ("Evans") is a capital prisoner in the Commonwealth of

---

* Written consent to the filing of this brief has been obtained from the parties to this case. The consent letters accompany this brief.

Virginia whose Petition for a Writ of Certiorari, now pending before this Court, raises a similar question.[1]

Evans was tried, convicted and sentenced to death in April 1981 for an offense that occurred in January 1981. The capital sentencing statute in place at the time of Evans' offense, trial, sentencing, and direct appeal gave the prosecution one and only one opportunity to obtain a death sentence: "[I]f the Commonwealth failed to secure a death sentence due to errors in the sentencing process it was foreclosed from seeking capital resentencing and the defendant received an automatic sentence of life imprisonment." *Evans v. Thompson*, 881 F.2d 117, 119 (4th Cir.), *cert. pending*, No. 89-516 (filed Sept. 27, 1989).[2]

A full year after Evans' conviction and death sentence had become final, Virginia enacted an emergency amendment to its capital sentencing statute which repealed the prior law and authorized for the first time capital resentencing for those cases in which a capital sentence was set aside for error. Less than three weeks later, the Commonwealth confessed error and moved to vacate Evans'

[1] *See Evans v. Thompson*, 881 F.2d 117 (4th Cir.), *cert. pending*, No. 89-516 (filed Sept. 27, 1989). Evans' petition presents four additional questions: (1) whether imposition of the death sentence upon resentencing in his case violated the equal protection clause of the United States Constitution; (2) whether the Commonwealth violated Evans' right to the due process of law by failing to disclose known prosecutorial misconduct for two years, until Virginia had enacted emergency legislation authorizing for the first time capital resentencing; (3) whether Evans was denied the effective assistance of counsel during the course of his direct appeal; and (4) whether Evans was denied the due process of law by the trial court's erroneous suggestion, in response to a specific jury question, that a split decision would not automatically result in a sentence of life imprisonment, when in fact state law mandated that it would.

[2] *See also Patterson v. Commonwealth*, 222 Va. 653, 283 S.E.2d 212 (1981). Similarly, Virginia law mandated that the defendant receive an automatic sentence of life imprisonment if the jury failed to reach unanimous agreement in the sentencing phase. *See* Va. Code § 19.2-264.4(E) (1983).

death sentence, admitting that the sentence rested on evidence that was " 'seriously misleading' or 'otherwise defective.' " [3] Over objection, Evans was resentenced under the new statute, and received the death sentence.

Evans' claim, like Youngblood's, is that he was entitled to the disposition mandated by the earlier law—which for Evans would have been a sentence of life imprisonment without parole. In Youngblood's case, the new law meant the difference between innocence and guilt; in Evans' case, the difference is between life and death.

STATEMENT

The facts of Youngblood's offense are not in dispute and, despite their questionable relevance, have been set out in detail by petitioner in its brief. At the same time, petitioner ignores a body of historical fact concerning Texas law which is of critical importance to the proper determination of the *ex post facto* issue before the Court. Properly considered, those historical facts refute the notion, central to petitioner's argument, that Youngblood's right to a new trial was a "quirk in state law" and "a mere fortuity with no basis in law or logic." [4]

For over 125 years, Texas law unequivocally provided that any jury verdict which assessed an unauthorized punishment was void at its inception; and that whenever judgment was entered on such a verdict, the defendant was entitled to a new trial on all issues. In 1856, the Texas legislature adopted its first Code of Criminal Procedure. Article 626 of the Code, which remained virtually unchanged until 1965, provided defendants with a right

[3] The Virginia Supreme Court later strongly criticized the prosecutor for his "indifferent, careless" conduct in introducing at Evans' capital sentencing hearing evidence that the prosecutor knew was seriously flawed. *See Evans v. Commonwealth*, 228 Va. 468, 323 S.E.2d 114, 117, 120 (1984), *cert. denied*, 471 U.S. 1025 (1985).

[4] *See* State of Texas' Petition for Writ of Certiorari at 13 (filed Nov. 18, 1989) (hereafter "Petition for Writ of Certiorari").

to have a jury assess both guilt and punishment in a unitary verdict.[5] The Texas courts construed this legislation as providing defendants with an absolute protection from the imposition of punishment if the jury's verdict was incomplete, erroneous, or otherwise unauthorized in any respect. Thus, if the jury returned a finding of guilt, but failed to assess punishment, the determination as to guilt was rendered void; such a verdict would be "but a dead letter, a nullity to which nothing could give force or vitality." [6]

Similarly, if the jury failed to provide both elements of the verdict with the proper degree of specificity—or assessed a punishment in excess of, or different from, that authorized by law—the verdict was rendered invalid in its entirety, and the defendant was entitled to a new trial. *Buster v. State*, 42 Tex. 315, 320 (1875). Although the courts sometimes questioned the wisdom of a legislative policy that nullified an entire verdict (thereby returning the defendant to liberty) because of errors in only one portion of it,[7] they nevertheless enforced that policy with uncompromising rigor.[8] And they insisted

[5] Article 626 provided, in pertinent part, that the jury "must find that the defendant is either 'guilty' or 'not guilty;' and, in addition thereto they shall assess the punishment in all cases where the same is not absolutely fixed by law, to some particular penalty." Tex. Code Crim. Proc. art. 626 (1856). That section became Article 693 when the Code was revised in 1925, but otherwise remained essentially unchanged.

[6] *Wooldridge v. State*, 13 Tex. Crim. 443, 457 (1883). The court further observed that under such circumstances, no court would be "authorized or warranted in holding the verdict sufficient, and in supplying the deficiency and awarding a punishment commensurate with the finding . . . ." *Id.*

[7] *See Buster v. State*, 42 Tex. at 320.

[8] *See, e.g., Wooldridge v. State*, 13 Tex. Crim. 443 (1883) (judgment reversed where jury found defendant guilty of "fist" degree murder, instead of "first" degree murder); *Evans v. State*, 35 Tex. Crim. 485, 487 (1896) (new trial ordered where jury sentenced defendant to "reform school" and statute authorized punishment only in the "penitentiary" or in the "house of correction and reformatory"); *Shackelford v. State*, 277 S.W.2d 695 (Tex. Crim. App. 1925) (judgment reversed, and new trial ordered, where trial court sought to rectify improper instruction concerning permissible range of punishments by lowering punishment assessed by jury to minimum level permitted by law; even though the reformed verdict was more advantageous to the defendant than the original erroneous one, the defendant was still entitled to have entire verdict set aside). In subsequent cases, the Texas courts have forgiven obvious grammatical errors in otherwise valid verdicts, *see, e.g., Wilkes v. State*, 237 S.W.2d 991, 992 (Tex. Crim. App. 1951); however, the courts continued to invalidate the entire verdict whenever any portion of it was unauthorized or erroneous. *See* discussion in text at 6-7.

that any change in the law must come from the legislature.[9]

In 1965 and 1967, the Texas legislature made fundamental changes to the Criminal Code (hereafter, the "1967 amendments"); but at the same time it elected to continue, rather than change, the century-old rule voiding an entire jury verdict for errors in the penalty phase. That decision was all the more significant because among the amendments, Texas abolished the requirement of a unitary verdict on both guilt and punishment, and established the current, bifurcated proceeding. The 1967 amendments allowed the defendant to elect whether to have punishment imposed by judge or by jury; if the defendant chose the latter, he was entitled to the same protections afforded by the 1856 Code.[10] Specifically, the

[9] *See Buster v. State*, 42 Tex. at 320.

[10] The 1967 amendments provided no similar protections to defendants who elected to have punishment determined by the court; if an error occurred in a judge's sentencing, it could be corrected without impairing the finding of guilt. *See King v. State*, 710 S.W.2d 110, 114 (Tex. Crim. App. 1986), *cert. denied*, 484 U.S. 829 (1987) (where trial court assessed unauthorized punishment, Court of Appeals can set aside sentence, and remand for new hearing on punishment); *Tyra v. State*, 534 S.W.2d 695, 698 (Tex. Crim. App. 1976), *ovrld. on other grounds, Cooper v. State*, 631 S.W.2d 508 (Tex. Crim. App. 1982).

amendments required that the "punishment . . . be assessed by the *same* jury" that determined guilt.[11] In addition, whenever the defendant elected to have punishment imposed by jury, the verdict "shall not be complete until the jury has rendered a verdict both on the guilt or innocence of the defendant and the amount of punishment, where the jury finds the defendant guilty."[12] Finally, the amendments provided that where the jury failed to agree on either portion of the verdict, "a mistrial shall be declared, the jury shall be discharged, and no jeopardy shall attach."[13]

At the same time that the Texas legislature chose to reconfirm the important protections provided by the prior law, they chose not to give the appellate courts any power to reform or modify punishment assessed by a jury. *See* Tex. Code Crim. Proc. Ann. art. 44.24(b) (Vernon 1979). The courts themselves recognized this limitation, and lamented it: "The Legislature . . . never [saw] fit to give [the] Court [of Criminal Appeals] or any intermediate appellate Court of [Texas] authority to assess punishment or reduce punishment assessed by a jury where the conviction was for a non-capital felony." *Bogany v. State*, 661 S.W.2d 957, 959 (Tex. Crim. App. 1983) (en banc) (Teague, J., concurring).

For the past two decades, Texas courts have interpreted the 1967 amendments in harmony with the protections afforded by the earlier Code. In an unbroken line of cases Texas courts have held that where punish-

[11] Tex. Code Crim. Proc. Ann. art. 37.07(2)(b)(2) (Vernon 1981) (emphasis added). By legislation effective September 1, 1985, this provision was amended to permit, for the first time, assessment of punishment by a different jury on retrial if the initial punishment was set aside for error. Acts 1985, 69th Leg., ch. 291, § 1, eff. Sept. 1, 1985. *See* Tex. Code Crim. Proc. Ann. art. 37.07(2)(b)(2) (Vernon Supp. 1990); art. 44.29(a) (Vernon Supp. 1990).

[12] Tex. Code Crim. Proc. Ann. art. 37.07(3)(c) (Vernon 1981 & Supp. 1990).

[13] *Id.*

ment was erroneously imposed by the jury, the case stood precisely in the same position as if the jury had failed to reach a verdict—and thus, in accordance with the statutory provisions set forth above, the *entire* verdict (of both guilt and punishment) was void from inception. *See, e.g., Ellison v. State*, 432 S.W.2d 955, 957 (Tex. Crim. App. 1968); *Ocker v. State*, 477 S.W.2d 288, 291 (Tex. Crim. App. 1972); *Smith v. State*, 479 S.W.2d 680, 681 (Tex. Crim. App. 1972); *Bogany v. State*, 661 S.W.2d at 959; *Ex parte Spaulding*, 687 S.W.2d 741 (Tex. Crim. App. 1985) (en banc).

Ex parte Spaulding is particularly instructive. In that case, the jury found the defendant guilty of aggravated sexual abuse, and sentenced the defendant to serve fifty years imprisonment and to pay a fine of $10,000. When the defendant collaterally attacked the verdict because it included, in addition to a term of imprisonment, a fine unauthorized by law, the state sought to cure the error by having the Governor of Texas remit the fine. The Texas Court of Criminal Appeals rejected that suggestion and vacated the entire verdict. In language that echoes an opinion issued one hundred years earlier, the court observed that the jury's unauthorized sentence rendered the entire verdict "void . . . absolutely null . . . [and] of no legal force and effect whatever . . . ." *Ex parte Spaulding*, 687 S.W.2d at 743 (citations omitted).[14] As the court held, "[s]uch judgment and sentence being void, the error is incurable and any subsequent attempt at remitting the fine portion of a void sentence is also void. . . . Even the Governor, with his constitutional powers, may not breathe new life into a 'dead' judgment." *Id.*

This was the law in effect at the time of the offense, trial, sentencing and direct appeal in the instant case. This law remained in effect for nearly a full year after

[14] *See Wooldridge v. State*, 13 Tex. Crim. App. at 457 (observing that a verdict of guilt, absent a jury determination of valid punishment, "would in fact be but a dead letter, a nullity to which nothing could give force or vitality").

Youngblood's conviction and sentence had become final. Effective June 11, 1985, Texas reversed its 129-year-old practice, by expressly authorizing the courts for the first time to reform erroneous jury verdicts by "omit[ting]" any portion of the punishment "not authorized by law for the offense." [15]

It is beyond dispute that the March 1982 verdict in the Youngblood case included a penalty "not authorized by law." Similarly, there is no question that Texas law at the time of that verdict mandated that the entire verdict rendered against Youngblood—including the jury's determination of guilt and assessment of punishment—was absolutely void, and that any attempt to revive the sentence and cure its defects was similarly void as a matter of law. *See Ex parte Spaulding*, 687 S.W.2d at 743; *Smith v. State*, 479 S.W.2d at 681. Absent the 1985 legislative amendment, Youngblood was entitled to an order vacating the jury's determination and prohibiting any punishment pursuant to the void and invalid conviction.[16]

SUMMARY OF ARGUMENT

From the earliest days of the Republic, this Court has construed the *ex post facto* clause of the United States Constitution [17] as prohibiting a wide array of retrospective statutes that have a substantial adverse impact on criminal defendants. Far from restricting application of the prohibition to only those statutes that fit neatly within a narrow, mechanistic formula, the Court has consistently taken an open-ended, pragmatic approach, prohibiting legislation that, regardless of its form, retroactively alters the substantial rights of criminal defendants. The only exceptions have been statutes that are

[15] Tex. Code Crim. Proc. Ann. art. 37.10(b) (Vernon Supp. 1990).

[16] To be sure, no jeopardy would attach in such circumstances. Thus, the state would retain the right to seek a retrial and punishment before a different jury.

[17] U.S. Const. Art. I, § 10, cl. 1.

purely procedural in both form and effect. They consist of neutral statutes which alter the rules governing how evidence is presented to the fact-finder, or the court responsible for hearing it, or involve similar changes that are evenhanded as between the defendant and the state.

The court below correctly applied these longstanding principles in finding that the *ex post facto* clause prohibited application of a Texas law which (although "procedural" in form) operated to deprive the defendant retroactively of his clear, statutory right to liberty. Applied retroactively, the Texas statute validated a previously void verdict, deprived the defendant of an absolute defense to punishment, and permitted the state to fashion and impose a sentence of life imprisonment that had been expressly forbidden by the law in place at the time of the defendant's offense and trial. Contrary to petitioner's assertions, the unanimous decision of the court below is entirely consistent with almost two hundred years of precedent set by this Court and the lower courts.

Finally, petitioner urges this Court to turn the clock back on two centuries of precedent, and to adopt, as a definition of rights protected by the *ex post facto* clause, an illustrative and historical list of abuses identified in the dicta of one Justice in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798). Even if that approach is followed, the Texas statute involved here would still fall, because it retroactively eliminated a defense to the imposition of punishment that existed in law at the time of the offense and trial.

ARGUMENT

I. RETROACTIVE APPLICATION OF THE TEXAS STATUTE AT ISSUE HERE VIOLATED THE *EX POST FACTO* CLAUSE BECAUSE IT DEPRIVED THE DEFENDANT OF THE "SUBSTANTIAL RIGHT," MANDATED BY THE LAW IN PLACE AT THE TIME OF TRIAL, TO BE FREE FROM THE VERDICT OF GUILT AND PUNISHMENT RENDERED AGAINST HIM.

The fundamental assertion of both petitioner and amicus curiae the United States [18] is that the *ex post facto* clause should be construed narrowly in accordance with a "bright line" test. They claim that no retroactive penal legislation, no matter how detrimental to the defendant, violates the clause unless it does one of three things: alters the definition of a crime, restricts the scope of a defense, or increases the prescribed punishment.[19] Petitioner's restrictive reading of the clause has no historical support, and is fundamentally in error.

For nearly two centuries this Court has resisted adopting such a narrow, mechanistic approach to the *ex post facto* protection. The Court has instead recognized that the clause prohibits retroactive enforcement of a wide array of legislative acts that adversely affect the defendant. Many of the statutes struck down by this Court and the lower courts have a substantial adverse impact on the defendant, even though they take a "seemingly procedural form." *Miller v. Florida*, 482 U.S. 423, 433 (1987) (citation omitted). The Texas statute at issue here is precisely of that nature, and accordingly, cannot be applied retroactively.

---

[18] The Brief of the United States as Amicus Curiae, filed January 25, 1990, will be referred to as "Brief of the United States."

[19] *See* Brief of the United States at 5; Petitioner's Brief at 7.

A. From the Beginning of the Republic, This Court Has Construed the *Ex Post Facto* Clause to Prohibit a Wide Array of Retrospective Legislation Which Has a Substantial Adverse Impact on the Defendant.

The command that a state shall pass no "*ex post facto* Law" [20] is a core constitutional protection that restrains the government from retroactively enforcing penal sanctions. That protection was enshrined in the body of the Constitution and has been recognized by this Court from the earliest days of the Republic. In *Calder v. Bull*, the first decision construing the clause, this Court recognized two great principles that have informed *ex post facto* jurisprudence in the next two centuries. First, the Court noted that the core purpose of the *ex post facto* clause is to restrain arbitrary and vindictive legislation: the clause is a "bulwark in favor of the personal security of the subject, to protect his person from punishment by legislative acts, having a retrospective operation." [21] Second, the Court recognized that there is no easy formula for determining which specific legislative acts are prohibited. As Justice Chase noted, the clause on its face provides no guidance: it "necessarily requires some explanation; for, naked and without explanation, it is unintelligible, and means nothing." *Calder v. Bull*, 3 U.S. at 389.

In an oft-quoted dictum, Justice Chase provided some of the "explanation" by listing four examples of the kind of legislative acts that would violate the clause if applied retroactively.[22] But those examples, which were based on

---

[20] U.S. Const. Art. I, § 10, cl. 1.

[21] *Calder v. Bull*, 3 U.S. at 389 (opinion of Chase, J.). In separate concurring opinions, Justices Paterson and Iredell likewise emphasized that the clause was aimed at preventing legislative abuses. *See id.* at 396 (Paterson, J.); *id.* at 399-400 (Iredell, J.).

[22] Although the entire discussion is illuminating, it is at bottom but the dicta of a single Justice. The Court's holding in *Calder v. Bull* is only that the *ex post facto* clause does not reach civil legislation, but is confined instead exclusively to penal statutes.

specific acts of Parliament universally regarded as repugnant,[23] were never intended to exhaust the possibilities.[24] In the sentence immediately following his list of examples, Justice Chase noted that the clause bars other, "similar laws" which, when applied retroactively, are "manifestly unjust and oppressive" to the defendant. According to Justice Chase, "[e]very law that takes away or impairs rights vested, agreeable to existing laws, is retrospective, and is generally unjust . . ."; and with the exception of statutes which "mollif[y] the rigor of the criminal law," retroactive penal legislation should generally be prohibited. *Calder v. Bull*, 3 U.S. at 390.[25]

---

[23] Justice Chase observed that the prohibition against *ex post facto* legislation arose, in large part, as a reaction to past excesses of Parliament. *Calder*, 3 U.S. at 388. Early in the opinion, he discussed several specific acts of Parliament that he viewed to be particularly onerous and notorious, including: (1) the case of the Earl of Strafford in 1641 (declaring an act to be a crime, which was innocent when done); (2) the cases of Lord Clarendon in 1669 and the Bishop of Atterbury in 1723 (aggravating a crime by inflicting punishment where under prior law the party was not liable for any punishment); (3) the Coventry Act of 1670 (inflicting greater punishment than that permitted under the prior law); and (4) the case of Sir John Fenwick in 1696 (altering the legal rules of evidence to receive less evidence than the law required at the time of the commission of the offence). *Id.* at 388-89. These examples of parliamentary abuses are reflected in Justice Chase's list of legislative acts prohibited by the *ex post facto* clause. *Id.* at 390. But, far from serving as an exhaustive recitation of prohibited acts, the list only insured that certain specific and widely known excesses of Parliament would be included among those acts prohibited under the constitutional prohibition.

[24] As this Court observed in *Kring v. Missouri*, 107 U.S. 221, 228 (1883), "it is not to be supposed that the opinion in [*Calder v. Bull*] undertook to define, by way of exclusion, all the cases to which the constitutional provision would be applicable."

[25] That same understanding of the clause's breadth was reflected in a contemporaneous decision of the federal circuit court, in which Circuit Justice Washington noted that the clause prohibits retroactive application of any law "which, in relation to the offence, or its consequences, alters the situation of a party, to his disadvantage." *United States v. Hall*, 26 F. Cas. 84 (D. Pa. 1809) (No. 15,285), *aff'd*, 10 U.S. (6 Cranch) 171 (1810).

Since *Calder* the Court has struggled to distinguish permissible from prohibited retroactive legislation. Rather than adopt a narrow, mechanistic formula, the Court has repeatedly opted for a more open-ended, pragmatic approach.[26] That approach has been necessitated both by the myriad of legislative enactments that are possible, and by the fact that many oppressive and impermissible statutes take a "seemingly procedural form." *Miller v. Florida*, 482 U.S. at 433. As Justice Stone long ago observed for a unanimous Court: "Just what alterations of procedure will be held to be of sufficient moment to transgress the constitutional prohibition cannot be embraced within a formula or stated in a general proposition. The distinction is one of degree." *Beazell v. Ohio*, 269 U.S. 163, 171 (1925).

Guidance in drawing that distinction is found in two cases, decided by the same Court within one month of each other, dealing with seemingly procedural changes, and reaching opposite results. In both *Thompson v. Missouri*, 171 U.S. 380, 383-86 (May 31, 1898) and *Thompson v. Utah*, 170 U.S. 343, 351-52 (April 25, 1898), the Court recognized that no criminal defendant has the right "to be tried in the exact mode, in all respects, that may be prescribed for the trial of criminal cases at the time of the commission of the offence. . . ."[27] In both cases the Court also observed that the *ex post facto* clause

---

[26] *See, e.g., Beazell v. Ohio*, 269 U.S. 163, 170 (1925) (*ex post facto* clause proscribes changes in procedure which "operate to deny to the accused a defense available under the laws in force at the time of the commission of his offense, or which otherwise affect him in such a harsh and arbitrary manner as to fall within the constitutional prohibition"). *See also Kring v. Missouri*, 107 U.S. at 228-32; *Mallett v. North Carolina*, 181 U.S. 589, 594-95 (1901).

[27] *Thompson v. Missouri*, 171 U.S. at 386; *Thompson v. Utah*, 170 U.S. at 351.

does not prohibit legislative "[r]emedies" which alter the "mere modes of procedure" applicable at trial.[28]

At the same time, the Court endorsed a broad view of the clause's protection, holding that it prohibits retroactive application of any law that "alters the situation of the accused to his disadvantage," or "materially impairs" his rights under the law existing at the time of the crime, or "dispense[s] with any of those substantial protections with which the existing law surrounds the person accused of crime."[29] Thus, where the change in law did no more than regulate "the mode in which the facts constituting guilt may be placed before the jury,"[30] and did so in an evenhanded manner, without "giv[ing] the prosecution any right that was denied to the accused,"[31] retroactive application of the statute was permitted. By contrast, where the change in law benefitted only the prosecution at the expense of the accused—by reducing the number of jurors needed to convict—the same Court found that retroactive application of such a statute violated the clause.[32]

Consistent with this history, the Court in its most recent *ex post facto* decisions has continued to take a flexible approach. It has articulated a two-part test to determine whether a law falls within the *ex post facto* pro-

---

[28] *Thompson v. Missouri*, 171 U.S. at 386; *Thompson v. Utah*, 170 U.S. at 351.

[29] *Thompson v. Missouri*, 171 U.S. at 386 (citations omitted); *Thompson v. Utah*, 170 U.S. at 351-52 (citations omitted).

[30] *Thompson v. Missouri*, 171 U.S. at 386.

[31] *Id.* at 387.

[32] *Thompson v. Utah*, 170 U.S. at 352-53. Moreover, the Court observed that if the state were permitted retroactively to reduce the number of jurors from 12 to 8, "it could just as well have prescribed a jury of four or two, and, perhaps, have dispensed altogether with a jury, and provided for a trial before a single judge." *Id.* at 353.

hibition: "first, the law 'must be retrospective, that is, it must apply to events occurring before its enactment'; and second, 'it must disadvantage the offender affected by it.'" *Miller v. Florida*, 482 U.S. at 430 (quoting *Weaver v. Graham*, 450 U.S. 24, 29 (1981)). Shunning a rigid, restrictive test, the Court reaffirmed the principle that changes in procedure that materially impair the rights of the accused violate the *ex post facto* clause. It noted that while the distinction between substance and procedure might sometimes "prove elusive," a "change in the law that alters a substantial right can be *ex post facto* 'even if the statute takes a seemingly procedural form.'" *Id.* at 433 (quoting *Weaver v. Graham*, 450 U.S. at 29 n.12).[33]

B. This Court and the Lower Courts Have Repeatedly Held That New Laws of Criminal Procedure Cannot Be Applied Retroactively If They Cause Substantial, Demonstrable Prejudice to the Defendant.

The decisions of this Court and the lower courts applying the *ex post facto* clause cover a spectrum ranging from purely substantive to purely procedural laws. At one end are those decisions barring retroactive application of statutes that materially impair the rights of the defendant either by criminalizing conduct that was innocent when committed, or by increasing the penalty ascribed to criminal conduct.[34] These decisions rest on the principle that it is manifestly unfair to punish those who have had no fair warning of the consequences of their actions at the time they were committed. Closely related, though less egregious, are those statutes that retroactively alter the range of permissible penalties, without increasing the maximum. These statutes are harsh and oppressive, and hence prohibited, not because the defendant lacked fair warning that he might receive the maximum

---

[33] *See also Dobbert v. Florida*, 432 U.S. 282, 293 (1977).

[34] *See Weaver v. Graham*, 450 U.S. 24 (1981); *In re Medley*, 134 U.S. 160 (1890).

sentence, but rather because the new law increases the likelihood that the defendant in fact will receive that penalty.[35]

At the other end of the spectrum are purely procedural statutes which alter the fact-finding process, or the courts where that process occurs, in ways that are evenhanded and neutral vis-a-vis the defendant. Thus, consistent with the principles discussed in *Thompson v. Missouri*, the Court has upheld laws that retroactively changed venue rules,[36] broadened the class of witnesses permitted to testify on behalf of either party,[37] reduced the number of judges assigned to hear appeals,[38] granted the government the right to appeal (and thereby correct) the erroneous decision of an intermediate appellate court,[39] and modified the procedures for administering the death penalty to add constitutionally required protections for the defendant.[40]

Between these extremes are a series of decisions barring retroactive application of laws that—like the one at issue here—have a procedural form, but a substantive impact. They include not only *Thompson v. Utah*, but also this Court's seminal decision barring the retroactive abrogation of a state law rule treating conviction of a lesser-included offense as acquittal of the greater offense. *Kring v. Missouri*, 107 U.S. 221 (1883). More recently, this Court held that a statute which retroactively "foreclosed [the defendant's] right to challenge the imposition of a sentence" by eliminating his prior right of appeal

---

[35] *See Lindsey v. Washington*, 301 U.S. 397, 401-02 (1937). *See also Miller v. Florida*, 482 U.S. at 432-33; *Kring v. Missouri*, 107 U.S. at 224.

[36] *Gut v. State*, 76 U.S. 35 (1870).

[37] *Hopt v. Utah*, 110 U.S. 574 (1884).

[38] *Duncan v. Missouri*, 152 U.S. 377, 382-83 (1894) (dicta).

[39] *Mallett v. North Carolina*, 181 U.S. at 597.

[40] *Dobbert v. Florida*, 432 U.S. at 296-97.

"substantially disadvantaged" the defendant in violation of the clause.[41]

Each of these statutes did far more than "simply alter[] the methods employed" in the fact-finding process to determine guilt or punishment.[42] None of them was neutral or evenhanded as between the prosecution and defendant; and they did not simply add another protective layer of review to improve the reliability and integrity of the fact-finding process.[43] Rather, their entire purpose and effect was to strip from the defendant a protection available at the time of the offense and thus alter the balance to the advantage of the state.

Consistent with these principles, lower courts have also repeatedly barred retrospective laws that, though seemingly procedural, had a substantial adverse impact on the defendant. These include laws which retroactively extend the statute of limitations for criminal offenses once the original statutory period has lapsed;[44] eliminate the

---

[41] *Miller v. Florida*, 482 U.S. at 432. To be sure, the Florida statute at issue in *Miller* "disadvantaged" the defendant in other respects as well: it altered the "presumptive sentence range" applicable to the offense and relieved the trial judge of any responsibility for "provid[ing] any reasons, convincing or otherwise," for imposing a sentence within the newly-prescribed range. *Id.* at 432-33. At least one lower court, however, has suggested that the denial of the defendant's right of appeal, standing alone, would be sufficient to violate the clause. *See Rubino v. Lynaugh*, 845 F.2d 1266, 1279 (5th Cir. 1988) (King, J., concurring). *Cf. Ex parte Abahosh*, 561 S.W.2d 202, 203 (Tex. Crim. App. 1978) (denial of defendant's automatic right of appeal violated state *ex post facto* clause).

[42] *See Dobbert v. Florida*, 432 U.S. at 293-94.

[43] *See, e.g., Dobbert*, 432 U.S. at 293-94 (no *ex post facto* violation in allowing retroactive legislation that accords capital defendant additional levels of sentencing review); *Mallett v. North Carolina*, 181 U.S. 589 (1901) (no *ex post facto* violation in allowing government right to appeal erroneous ruling, thereby enhancing the accuracy and reliability of appellate review).

[44] *See Moore v. State*, 43 N.J.L. 203, 222-23 (1881); *Sobiek v. Superior Court*, 28 Cal. App. 3d 846, 106 Cal. Rptr. 516, 518

requirement that prosecutions commence by grand jury indictment, and instead, allow them to proceed by information;[45] abolish the defendant's right of appeal;[46] or shift to the defendant the burden of proving the defense of insanity.[47]

In addition to these decisions, it is not hard to imagine other "procedural" changes which are permissible if applied prospectively, but which the *ex post facto* clause would foreclose if applied retroactively. These might include, for example, laws that abolish a state-created requirement of conviction by a unanimous verdict in favor of conviction by a simple majority; allow the state to seek resentencing in capital cases in which the sentencing jury has deadlocked over penalty, when the law in place at the time of the offense mandated an automatic sentence of life imprisonment under such circumstances;[48]

(1972); *State v. Edwards*, 701 P.2d 508, 512 (Wash. 1985) (en banc). Other courts have taken the same position, albeit in dicta. *See Falter v. United States*, 23 F.2d 420, 425-26 (2d Cir.), *cert. denied*, 277 U.S. 590 (1928); *United States ex rel. Massarella v. Elrod*, 682 F.2d 688, 689 (7th Cir. 1982), *cert. denied*, 460 U.S. 1037 (1983); *Clements v. United States*, 266 F.2d 397, 399 & n.4 (9th Cir.), *cert. denied*, 359 U.S. 985 (1959); *United States v. Fraidin*, 63 F. Supp. 271, 279 (D. Md. 1945).

[45] *Mafnas v. Government of Guam*, 228 F.2d 283, 286 (9th Cir. 1955).

[46] *Cf. Ex parte Abahosh*, 561 S.W.2d at 203 (retroactive elimination of defendant's automatic right to appeal conviction, adopted between time defendant pled guilty to crime and was sentenced by the court, violated Texas constitutional protection against *ex post facto* laws). *See also Camp v. State*, 200 S.E. 126 (Ga. 1938) (elimination of the defendant's prior right to have punishment administered by jury, rather than by the court, violates clause); *Hurt v. State*, 199 S.E. 801 (Ga. 1938) (same).

[47] *United States v. Kowal*, 596 F. Supp. 375, 378-79 (D. Conn. 1984).

[48] In many jurisdictions, a capital defendant is entitled to an automatic sentence of life imprisonment if the sentencing jury is

or eliminate the defendant's statutory right to a new trial by replacing (shortly after the defendant's conviction) a statute mandating a new trial upon proof that the prosecution destroyed exculpatory evidence for any reason, with one which requires the defendant to prove bad faith.

Each of these laws is intended to and does operate solely to the detriment of the defendant. Each law represents a legislative judgment that the balance between the prosecution and defendant should be altered to enhance the state's opportunity to penalize unlawful conduct. That objective is constitutionally permissible, and may even be laudable, when applied to future conduct. But it is "harsh and arbitrary"[49] when applied retrospectively to conduct that occurred prior to the legislative enactment.

The arbitrary character of such legislation is measurably heightened when the law is applied, as in this case, not simply to events that occurred prior to enactment, but to defendants who were tried and convicted (albeit improperly) under the prior law.[50] A cornerstone

---

unable to reach a unanimous verdict. *See, e.g.*, Va. Code § 19.2-264.4(E) (1983). Assume a jury is unable to reach a unanimous verdict on punishment, and is excused by the court, which then sets sentencing for one month later. Between the time the jury is excused and the sentencing date, however, the legislature amends the capital statute to permit the court to convene a second jury for resentencing—thus abolishing the defendant's right under the earlier statute to a sentence of life imprisonment upon return of a split verdict. Under petitioner's analysis of the *ex post facto* clause, the state would be permitted to reconvene a new jury, and seek to secure a death sentence when such sentence was prohibited under prior law.

[49] *Beazell v. Ohio*, 269 U.S. at 170.

[50] *Cf. Dobbert v. Florida*, 432 U.S. at 301 (in rejecting defendant's equal protection challenge to Florida's revised sentencing law, the Court put some weight on the fact that the state "had to draw the line at some point between those whose cases had progressed suffi-

of *ex post facto* jurisprudence from the beginning has been the notion that the clause prohibits the retroactive elimination of "vested rights" held by the defendant."[1] Although the reason why that factor is significant has never been fully explained, presumably it turns at least in part on the notion that a vested right is demonstrable, not conjectural; and the effect of its deprivation can be determined without speculation. At a minimum, this principle should mean that the defendant has a "vested right" to have his case judged by the substantive features of the law in place at the time of his offense, indictment, trial and appeal; and that the state is foreclosed from applying to his case a new, more onerous statutory scheme—adopted long after the crime and conviction—that deprives the defendant of a substantial protection afforded by the prior law. Yet that is precisely what occurred here.

In sum, the *ex post facto* test applied by the courts for nearly two centuries is far broader and more flexible than the one petitioner advocates. In addition to being retrospective, most *ex post facto* laws share two related characteristics. First, they alter the balance solely to the benefit of the state and against the defendant. Unlike changes affecting the way the evidence may be presented or the identity of the courts that receive and review it—factors which may inure to the benefit of either side—an *ex post facto* law is one-sided, not evenhanded. Second, *ex post facto* laws usually have a direct, substantial impact on the defendant, which can be demonstrated without resort to speculation. Laws denying a defendant

---

ciently far in the legal process as to be governed solely by the old statute . . . and those whose cases involved acts which could properly be subject to punishment under the new statute").

[51] *See, e.g., Calder v. Bull*, 3 U.S. at 390; *Hopt v. Utah*, 110 U.S. at 590; *Thompson v. Missouri*, 171 U.S. at 385-86. Although the Court has recently made clear that the clause also protects rights that have not "vested," *see Weaver v. Graham*, 450 U.S. at 29-30, those rights that have "vested" are *a fortiori* protected.

repose after a statute of limitations period has lapsed, or depriving a defendant of an absolute defense to punishment, or stripping the defendant of a right of appeal, will have a far greater, more tangible impact than changes which alter the rules of evidence after the offense but before the trial. For the same reason, fundamental changes in the law enacted after the defendant's trial (but before a retrial) should be far more difficult to justify, since their effect on the defendant's rights is clearly measurable and beyond dispute.

C. The Revised Texas Statute Caused Substantial Demonstrable Prejudice to Youngblood, Because It Retroactively Deprived Him of His Right to Liberty and the Presumption of Innocence.

The court below held that retroactive application of Article 37.10(b) deprived Youngblood of a substantial right, and thus violated the *ex post facto* clause. As the court correctly noted, this right was anchored in Texas law: "[I]t was the law of Texas that a verdict of the type rendered in this case was void *ab initio* and its imposition entitled the accused to a new trial. . . . Prior Texas law made it impossible to deprive defendants such as Youngblood of their liberty without affording them a new trial." *Youngblood v. Lynaugh*, 882 F.2d 956, 960 (5th Cir.), *cert. granted*, 110 S. Ct. 560 (1989). Moreover, the retroactive change in the law did not merely provide the appellate court with "an additional remedy to correct an unauthorized verdict," as the United States now contends.[52] Rather, the change stripped the defendant of his absolute, preexisting statutory right to an order vacating the jury's judgment of conviction and prohibiting imposition of any punishment. That right was plainly substantial not only because it carried with it the possibility of a lesser punishment (or none at all) in the event of a retrial; but even more significantly, it gave the

---

[52] Brief of the United States at 15.

defendant his liberty.[53] The retroactive elimination of that right should be impermissible under any circumstances. It was particularly egregious in this instance, where it occurred long after the defendant had been tried to a final (albeit erroneous) judgment under the earlier law.

Contrary to petitioner's contentions, the statutory rights taken from Youngblood three years after trial and sentencing were not a "quirk" or "fortuity with no basis in law or logic."[54] As set forth above, it was the consistent and unwavering judgment of the Texas legislature and judiciary for well over a century that the defendant had an absolute right to an error-free jury verdict on both guilt and punishment. That right was zealously enforced, with courts repeatedly invalidating the entire product of jury deliberations whenever the jury erred by assessing an unauthorized punishment. Although petitioner appears to question the wisdom of that policy, there is no doubt that it represented the considered judgment of the Texas legislature for over 125 years.

Petitioner and the United States are equally wrong about the significance of these rights under federal law.

---

[53] It is difficult to overstate the benefits to the defendant of the statutory scheme in place at the time of Youngblood's trial. Both petitioner and even the Court of Appeals subtly minimize the significance of these benefits by suggesting that they consist of the " 'right' to an entire new trial." Petitioner's Brief at 12; *Youngblood v. Lynaugh*, 882 F.2d at 960. In fact, it is the *state*, not the defendant, which receives that right. The defendant receives the far more precious right to have the entire verdict of guilt rendered void at its inception. That determination necessarily entails the right to receive the presumption of innocence, to the expunging of any evidence of a conviction, and to absolute freedom from the imposition of punishment unless and until the state opts to exercise its right of retrial and then succeeds in securing a valid verdict.

[54] Petition for Writ of Certiorari at 13.

Taken together, their arguments rest on three fundamental errors.

First, they attack the validity of *Thompson v. Utah*, upon which the court below expressly relied.[55] It is true, as the United States asserts, that the *Thompson* Court believed that the Sixth Amendment mandated a jury of twelve, and that subsequent decisions have rejected that notion. But that fact in no way undermines the validity of *Thompson*. The *ex post facto* clause would add nothing to the Constitution if the only changes it proscribed were ones that abolished other constitutional protections. In fact, most of the rights which this Court has found to be protected by the *ex post facto* clause are statutory creations which the legislature is free to abolish—although not retroactively.[56]

Petitioner's attack on *Thompson v. Utah* is a critical feature of its argument, because if *Thompson* survives, the decision below must stand. If the defendant's right to the benefit of a twelve-person jury is "substantial," the right to automatic vacatur of a conviction and life sentence is even more so. It is of crucial importance to note, however, that the converse is not true. Even if the Court were to overrule *Thompson*—a result that no party has requested—the decision below should still be upheld.

Thompson stands at the far limits of those cases involving procedural changes with a substantive impact.

---

[55] *See, e.g.*, Petitioner's Brief at 22 (*Thompson* is of "questionable precedential value"); Brief of the United States at 10 (*Thompson* arose out of "unusual circumstances" and "should not be given broad application to modern *ex post facto* claims").

[56] *See, e.g., Miller v. Florida*, 482 U.S. at 424-25 (retroactive application of revised sentencing guidelines); *Weaver v. Graham*, 450 U.S. at 30 & n.13 (retroactive abolition of statutory "gain time"). Petitioner's suggestion that the *ex post facto* clause only prohibits retroactive alterations of other constitutional rights has never been endorsed by any court, and was specifically rejected in *Rubino v. Lynaugh*, 845 F.2d at 1272.

The Court in *Thompson* correctly perceived that the larger a criminal jury, the greater the burden on the prosecution of convincing every juror to convict beyond a reasonable doubt. Arguably, however, the reduction in jury size could be regarded as evenhanded, simply requiring each side to convince an equal number of jurors. Here, by contrast, the prosecution was given a new statutory right that materially enhanced its position without any corresponding benefit to the defendant. In the face of a century of precedent to the contrary, the prosecution was allowed to validate and reform an otherwise invalid verdict, thereby depriving the defendant of the certainty of automatic vacatur and liberty.

Second, in an argument not mentioned by petitioner, the United States contends that *Mallett v. North Carolina*, 181 U.S. 589 (1901), controls the instant case. In *Mallett*, the petitioners had been convicted and sentenced to imprisonment by a North Carolina trial court; they appealed to the Superior Court, which reversed the conviction. At the time the defendants committed their offenses, the state was precluded from appealing adverse determinations of the Superior Court; but by the time the defendants had perfected their appeal to the Superior Court, that law had been changed to permit the state to appeal judgments of the Superior Court to the state Supreme Court. The state exercised that right and appealed from the judgment of the Superior Court. The North Carolina Supreme Court reversed the Superior Court, and remanded the case to the trial court with directions to impose sentence. *Id.* at 590. This Court held that this change in the appellate process—established before the defendants had perfected their initial appeal from the verdict—was consistent with the *ex post facto* clause.

In seeking to analogize *Mallett* to the case at bar, the United States suggests that in both instances, the prior law gave the defendant "a windfall when certain types of error occurred." Brief of the United States at 17. This argument has the facts exactly backwards. To be

sure, the defendants in *Mallett* were seeking a "windfall"; the trial court in *Mallett* had rendered a valid verdict, and the defendants wanted an order mandating that the erroneous decision of the state's intermediate appellate court, reversing that verdict, be frozen in place and given the force of law. Here the reverse is true. No one asserts or could assert that Youngblood's original conviction was valid; it is uncontested that, under prior law, such jury error mandated a new trial. Here it is the *state*, not Youngblood, that seeks to obtain a windfall by invoking a new law which allows it to do what had earlier been expressly prohibited—enforce a conviction that was otherwise void.[57] Put differently, in *Mallett* the defendant asserted that he was entitled to obtain the benefit of an erroneous judgment; in *Youngblood*, it is the state which seeks to obtain the benefit (*i.e.*, a conviction and sentence) from a judgment that was void as a matter of law when rendered.[58]

---

[57] *Mallett* is, in any event, distinguishable on other grounds. Allowing the prosecution a right of appeal from an erroneous judgment does no more than put both sides on an even plateau. In addition, the timing of the change in law seems to have played a crucial role in the Court's reasoning in *Mallett*. The Court was careful to note that the change in procedure occurred after the defendants had been convicted in the trial court, but before they had perfected their appeal. *Mallett*, 181 U.S. at 597. In invoking the benefits and opportunities of the appellate process, defendants may fairly be required to accept all the rules integral to the process in place at the time, including the rule allowing the prosecution the right to appeal to the state's highest court an erroneous determination in favor of the defendant by the intermediate court.

[58] Although petitioner and the United States both cite *Dobbert v. Florida*, that case is plainly distinguishable as well. The defendant in *Dobbert* committed his offense at a time when Florida had in place a capital sentencing statute which was manifestly unconstitutional and disadvantageous to defendants. By the time of Dobbert's trial, Florida had replaced its capital statute with one that provided the defendant a full panoply of procedural protections. Although Dobbert was sentenced to death under that statute, he claimed that the result might have been different had his case been judged under the old, draconian law. That argument stood the law

Finally, the United States asserts that policy concerns should lead to a finding against the defendant. The Government conjectures that the prior law, affording the defendant a new trial upon an unauthorized jury verdict, gave the defendant a "dangerous disincentive to correct trial error. . . ." Brief of the United States at 14 n.6. It is of course the legislature, not the judiciary, which is entrusted with responsibility for weighing such policies. But even if it were otherwise, this metaphysical "danger" is slight when compared to the potential for abuse that exists when the state is allowed retroactively to abolish the rights of defendants upon the occurrence or discovery of trial error. Under the *ex post facto* regime proposed by the petitioner, the state would have an unqualified incentive to delay correcting trial error (or even to conceal such error) pending adoption of such legislation.[59]

---

on its head: No defendant can properly claim a substantial right to be sentenced under an unconstitutional statute. *See Dobbert*, 432 U.S. at 295. Moreover, since Dobbert had never been tried under the old statute, his prediction about how the jury would have voted if that law had been in place was rank speculation. *Id.* at 294.

By contrast, the statute in place at the time of Youngblood's offense, trial and conviction was unquestionably constitutional and was designed to provide defendants with broad, "procedural" protections. Moreover, there is no need to speculate about the result if Youngblood's case were judged under that statute: his verdict of guilt and sentence of life imprisonment would be absolutely void. absolutely void.

[59] That danger is by no means conjectural. Indeed, in *Evans v. Thompson*, the state delayed conceding trial error for over two years—confessing error only after the legislature had passed emergency legislation permitting capital resentencing. 881 F.2d at 119. *See also State v. Norton*, 675 P.2d 577, 591 (Utah 1983), *cert. denied*, 466 U.S. 942 (1984) (Stewart, J., concurring and dissenting) (state files seven successive motions for continuance to file appellate brief, prolonging appeal for over one year, and thus bringing case within new statute permitting, for first time, capital resentencing).

II. EVEN IF THE STANDARD URGED BY PETITIONER AND THE UNITED STATES WERE ADOPTED, THE DECISION BELOW WOULD STILL BE CORRECT.

Petitioner and the United States urge the Court to turn the clock back 175 years and adopt, as the definition of *all* "substantial rights" protected by the *ex post facto* clause, selected portions from the dicta of one Justice in *Calder v. Bull*. In doing so, however, they acknowledge that even under their proposed test the state violates the *ex post facto* clause when it seeks retroactively to eliminate any defense previously available to the defendant.[60] That is precisely what occurred here.

There cannot be any doubt that the *ex post facto* clause rigidly proscribes any effort to impair an available defense. This Court reiterated that principle in *Dobbert v. Florida* stating that "any statute which . . . deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*." *Dobbert*, 432 U.S. at 292 (citations omitted).

The seminal decision on this point is *Kring v. Missouri*, 107 U.S. 221 (1883). In *Kring*, the defendant, charged with capital murder, pleaded guilty to second degree murder. He appealed from his sentence, arguing that it exceeded the terms set in the plea agreement. At the time of Kring's offense, the Missouri Constitution provided that a guilty plea to a lesser-included offense operated as an acquittal of the greater offense; by the time of Kring's plea, however, this state constitutional provision had been repealed. Following the appeal, in which Kring's sentence and conviction for second degree murder were vacated, Missouri retried Kring for the greater offense—first degree murder. Kring was convicted of that offense and sentenced to death.

---

[60] *See* Petitioner's Brief at 7; Brief of the United States at 7.

On appeal to this Court, Kring claimed that he was entitled to the benefit of Missouri's repealed law barring prosecution for the greater offense, because that provision had been in force at the time of the offense. Kring claimed that the state had violated the *ex post facto* clause when it denied him the benefit of the prior law and subjected him again to the death penalty. The state countered that the change in Missouri law was "simply . . . a matter of procedure." 107 U.S. at 224. This Court, however, rejected that argument, observing that "it is obvious that a law which is one of procedure may be obnoxious as an *ex post facto* law . . . ." *Id.* at 232. The Court noted that retroactive application of Missouri's law to Kring, which meant "the difference between life and death," *id.* at 224, violated the clause because it deprived him of an absolute defense to being re-exposed to the death penalty. *See id.* at 229, 234.[61]

Although there are few decisions construing this aspect of the *ex post facto* clause, all of them support respondent's position. As already noted, courts have uniformly prohibited retroactive extensions of statutes of limitations once the original period specified has lapsed. *See* discussion at page 17 & n.44, above. To do otherwise would deny the defendant a defense otherwise available to the imposition of punishment. An analogous situation arose in *State v. Keith*, 63 N.C. 140 (1869),[62] where an act of

[61] The United States does not question the validity of *Kring* and agrees that it stands for the proposition that the *ex post facto* clause prohibits the "retrospective removal of defenses." Brief of the United States at 11 n.5. Petitioner's attempt to find a "decisive distinction" between *Kring* and this case is based on a misreading of *Kring*'s facts. Contrary to petitioner's assertion (Brief at 22), the Missouri constitutional provision invoked by Kring had been repealed four years *before* Kring's plea. 107 U.S. at 222-24; *id.* at 236 (Matthews, J., dissenting). Moreover, although petitioner asserts that *Kring*'s validity is "questionable" (Brief at 21), this Court has recently cited its *ex post facto* principle with approval. *See Weaver v. Graham*, 450 U.S. at 29.

[62] Cited with approval in *Kring*, 107 U.S. at 231.

amnesty was passed after the defendant had committed his crime. Before the defendant was prosecuted, however, the amnesty act was repealed, and prosecution was instituted. The Supreme Court of North Carolina found application of the ordinance repealing the amnesty act to be "substantially an *ex post facto* law," since it "took away from the prisoner his vested right to immunity." *State v. Keith*, 63 N.C. at 153-54.

Retroactive application of Article 37.10(b) deprived Youngblood of an absolute defense to imposition of punishment arising out of a void, and entirely invalid verdict. Indeed, prior to passage of the statute at issue, any attempt to impose punishment based upon the invalid verdict, or to modify the defective judgment, was similarly void as a matter of law. *Ex parte Spaulding*, 687 S.W.2d at 743.[63] Where, as here, the defendant becomes, in essence, "dispunishable"[64] under application of prior law, retroactive deprivation of such a defense to punish-

[63] Petitioner suggests that since Youngblood was apprised of the criminal sanctions to which he exposed himself by his actions, such "fair warning" precludes any *ex post facto* challenges to the statute in question. *See* Petitioner's Brief at 13-14. Although this Court has recognized that a principal purpose of the *ex post facto* clause is to provide the defendant with "fair notice," fair notice is not the touchstone of all *ex post facto* jurisprudence. For instance, in the statute of limitations cases discussed at page 17 & n.44, above, the accused were "on notice" of the criminal sanctions to which they exposed themselves by virtue of their actions. Nonetheless, without exception, the courts have disallowed prosecutions undertaken pursuant to extended statutes enacted after the original limitations period had lapsed—even though the defendant had "fair warning" from the outset of the penalty associated with the crime. Similarly, this Court found an *ex post facto* violation in *Kring*, even though the offense he committed always carried the possibility of a death sentence. Indeed, in an earlier proceeding, before he pled guilty to second degree murder, Kring had actually been sentenced to hang for the offense. *See Kring v. Missouri*, 107 U.S. at 221-22; *id.* at 236 (Matthews, J., dissenting).

[64] *See Moore v. State*, 43 N.J.L. at 221.

ment clearly satisfies the standards articulated in *Calder v. Bull* and proposed by petitioner.[65]

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

ARTHUR F. MATHEWS *
THOMAS F. CONNELL
MARK D. CAHN
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000
Counsel for Amicus Curiae

* Counsel of Record

February 26, 1990

---

[65] Such a defense to imposition of punishment is, of course, even more persuasive where application of the original statute would not simply have vacated the verdict, as in this case, but would also have dictated the final result. Such is the case in *Evans v. Thompson*, where the original statute would have prohibited Virginia from resentencing Evans to death, and required imposition of an automatic sentence of life imprisonment.